THE JUVENILE COURT—ITS LEGAL ASPECT

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The framers of the Illinois legislation of 1898 and 1899, which led to the establishment in Chicago of the first juvenile court in the United States, had in mind a distinct legal principle upon which the legislation was based. The child, they said, henceforth shall be viewed as the ward of the state, to be cared for by it, and not as the enemy of the state, to be punished by it. The court thus became, in the minds of its founders, a concrete expression of the state's obligation to the child; a recognition that the child, in court as the result of conditions not of his own making, had a valid claim against the state, and was to be saved to the state and not punished by it. This principle is not new; on the contrary, it is old, and is found in many of the early English chancery cases.

The primary legal question involved, the one that we always meet in the thousands of cases coming before the juvenile courts, involves the right of the court to control the custody ot the child; to take it from its parents or guardian upon the broad ground that the welfare of the child and the good of the state require that this be done. The whole structure rests upon this proposition. Courts of last resort in this country, when called upon to construe laws creating juvenile courts, have uniformly upheld the right; they have rested the decisions upon the broad principle that the court is exercising a power used from the earliest times by the English chancellors. In the old cases the chancellors went so far as to hold that the right to take the child from the custody of its parents existed where the father ill-treats or shows cruelty to his infant children, or is in constant habits of drunkenness or blasphemy, or professes atheistical or irreligious principles, or where, living in debauchery, his domestic associations are such as tend to the corruption and contamination of his children.

It is claimed by many lawyers that the jurisdiction exercised by the juvenile court is a usurpation of power; that the precedents do not justify the procedure; that, although we do find the English

chancellors removing children from the custody of worthless parents, it was never done under circumstances analogous to the cases presented in the juvenile court; that, whereas it is true that courts of equity would undertake in certain cases to disturb the parents' custody, it was done only in cases where the child had some property interest involved; that, the question of the preservation of the child's estate being at issue, the chancellor would assume jurisdiction for the purpose of protecting the property of the child, and, as a mere incident of the exercise of this jurisdiction, would throw his protection around the person of the child; that where there was no property involved the chancellor could not step in to save the child. Protection of the child itself could follow only where it had property that needed protection. The question as to whether or not the child has any property is not material; that, given a particular case involving a dependent or delinquent child, the court will not hesitate to remove the child if the facts call for it. The supreme question is: Is the parent a fit person to continue as the guardian of the child, and if not, what should be done with the child?

What is the background for this, as found in judicial precedent? In 1790 we find a case (Creuze *vs.* Hunter, 2 Bro., C. C., 449) in which the father's affairs became embarrassed; he became an outlaw and resided abroad; the mother had been living apart from her husband, and had been directing the child's education. It appeared that gross charges had been urged both against the father and the mother. Lord Thurlow restrained the father from interfering with the education and care of his child, observing that he would not allow the color of parental authority to work the ruin of his child. The jurisdiction of the court to protect the child being questioned, the Lord Chancellor stated that he knew that there was such a notion, but that he was of the opinion that the court had arms long enough to reach such a case and to prevent a parent from prejudicing the health or future prospects of the child, and that whenever a case was brought before him he would so act.

The judgment indicates the existence of the power to protect the child against a worthless guardian for many years prior. It is striking that a principle so enlightened should have been announced by a judge who was notorious in his day for his immoral and profligate habits. In 1828, however, Lord Eldon (Wellesley *vs.*

Wellesley, 2 Russ., 1; 2 Bligh N. S., 124), delivered a judgment which has become the leading authority in England and in this country on the whole subject. In that case the Lord Chancellor took from the Duke of Wellesley his children because of his profligate and immoral conduct. It was sought to prevent the Lord Chancellor from interfering as between the father and his children because no property interest was involved. Lord Eldon, in an elaborate discussion, disposed of this contention and placed his judgment upon the broad proposition that the crown is the ultimate parent of the child, and that where the parent by nature has, by misconduct, forfeited his right to have the custody of his child, the king, as *parens patriæ,* through the chancellor, will step in and protect the child by removing it from the environment that must make for its undoing.

The greatest difficulty that confronted the early chancellors, where the custody of the child was disturbed, was how to exercise the jurisdiction so that the child could be maintained. Where the parent or child had property, it was simple: An order was made setting apart some of the estate for the purpose of maintenance. But where there was no property the court was powerless to reach out and protect the child, for the reason stated by Lord Eldon in the case to which I have referred, "because the court could not take upon itself the maintenance of all the children in the kingdom." This defect has been met in later days in two ways. Courts of equity have compelled the father to contribute a certain amount monthly or yearly for the support of the child, as was done in an early case in Illinois (Cowls *vs.* Cowls, 3 Gillman), and is now the universal rule, and the state itself has provided the means, by establishing institutions to which children may be sent, and by providing further by statute that children may be boarded out under certain conditions. It will be seen, therefore, that the difficulty of which the early chancellors complained has been remedied by simply enlarging a power which has existed for centuries, and by providing through state aid the means by which the power may be exercised. This legislation is distinctly in line with the theory that the crown in England, and the state in this country, is the ultimate parent of the child.

In so far, then, as the child, known under our laws as the dependent child, or the child having improper guardianship, is con-

cerned, the lawyer will be compelled to admit that the power exercised by the juvenile court is the same as the power exercised by courts of equity, and that there is abundant authority for it. With the lawyer convinced of the soundness of our position regarding the neglected child, there is still the question of the delinquent child to be disposed of. What authority, he asks, is there for handling the delinquent child under this legislation? He is a lawbreaker; he is an offender against the public peace; there is but one way known to the law of reaching him, and that is through a conviction for a specific offense. This point of view is due to a misconception of the principle underlying the legislation. The dominant idea in this argument is the act complained of, the thing with which the child is charged. No distinction is made in this point of view between the offending child and the adult criminal. They have both violated the law, and they must both be punished. But, as a matter of fact and history, even at common law, a distinction was made between the two. A child of seven had reached the age of criminal responsibility, and below that age he could not be held to be responsible for his criminal acts.

From time to time statutes have been passed in this country and in England fixing the arbitrary age-limit below which the child is not to be deemed criminally responsible, and above which he may be punished as an adult for his wrongdoing. The juvenile court legislation carries this idea forward. It raises the age limit, and says that a child of sixteen or seventeen, or under, for violations of law, shall not be deemed a criminal. At common law and in those states which have raised the age at which criminal responsibility begins, the child who is within the age exemption cannot be brought into court. This is the specific addition made by the juvenile court legislation. It thus establishes the principle that children under the jurisdictional age are neither to be treated nor punished as criminals for violations of law, yet they shall not "go quit," because they are exempt under the statutes. The court undertakes to apply the same procedure to the delinquent as it would to the neglected child. Proper regard for the principle underlying this legislation demanded at the outset that the court; *i. e.*, the judges and every part of the judicial machinery, be socialized. It is striking that, while the West has made consistent effort to work out the thought behind the movement, in many places in the East the attitude toward it is still hostile.

These children's courts continue to be mere criminal courts. In these courts every detail of the criminal law is worked out against the child. The sole question, so far as the child is concerned, is, "Did he commit the act with which he is charged? Is he guilty of larceny, or burglary, or robbery, as the case may be?" And, following the rigid rules of evidence, if the crime of larceny, burglary or robbery is not technically made out, the child is dismissed. If it is made out, he is convicted, fined, committed, is paroled to a day certain, or sentence is suspended. Back of the appearance of the child in court there may be conditions that cry out for correction. This is not, however, the material part of the proceeding. This, the main point of interest in an enlightened and humane public policy, is a secondary consideration. The inquiry is directed to the consideration of the evidence bearing upon the commission of a crime. Notwithstanding it has been generally conceded that the proceeding is equitable in its nature; that in it the state, as the ultimate parent of all children within its borders, stands in *loco parentis;* that it is not a criminal trial wherein the outraged state demands toll from the child for a wrong against the peace and dignity of the state, though we still find in the juvenile court laws some reminders of the older idea of a criminal trial, and certain suggestions indicating the hesitancy with which the framers of these laws moved in drawing them.

The right of trial by jury, for instance, is given to the child unless it is waived. This was done, in a large measure, on the theory that courts of last resort might hold that the proceeding was criminal or quasi criminal, and that, therefore, the constitutional guarantee of a jury trial to the accused could not be taken from it. As a matter of fact, whenever the courts have been called upon to construe these laws, they have declared, in no uncertain terms, that the constitutional provision of a jury trial is not violated by a failure to have a jury pass upon the evidence. The number of cases in which juries are called is negligible. The provision is, to all intents and purposes, a dead letter. For this reason, and because I believe that every part of the law that involves a criminal conception of it should be eliminated, I would strike from the law all that relates to a jury trial. In this new legislation I would not leave a vestige to be pointed at by the advocates of the older method as an evidence of adherence still to criminal procedure.

I would, therefore, write more clearly into these laws than has yet been done, the beneficent principle that the proceeding involving the child is not criminal, and that the child, furthermore, itself, is not to be treated as a criminal. We have stopped short of what it is possible to do. The laws now define "a delinquent child" or a "wayward child" or a "juvenile delinquent" as one who does any of the acts inhibited in the law; and the judgment at the conclusion of the hearing is that the child is a "delinquent child" or a "wayward child" or a "juvenile delinquent." In other words, while we have greatly softened the proceeding, it is, nevertheless, difficult to get away wholly from the idea that it is a proceeding involving a charge against the child, and while we have, likewise, softened the character of the judgment, it remains still a judgment against the child. I would, therefore, rewrite the sections of the law that define a "delinquent child." Instead of saying, as we do now, that a "delinquent child" or a "wayward child" or a "juvenile delinquent" is one who violates any law of the state or city, or village ordinance, etc., I would say any child who violates any law of the state or city, or village ordinance, who is embraced within any of the numerous things set out in the law, shall be deemed to be a child in need of the care and protection of the state; and instead of a judgment against the child, adjudging it to be a "delinquent child" or a "wayward child" or a "juvenile delinquent," the judgment should follow the original definition and merely adjudge that the child is in need of the care and protection of the state.

The language, as it now exists, is a concession to conservatism, made at a time when it was thought the courts might insist upon a specific charge being made against the child. The language above proposed is a logical development of the chancery principle upon which the whole structure rests. It merely means writing more emphatically in the law, than now appears, the principle that the whole proceeding is for the purpose of protecting the child. It would take away the last remnant of any stigma that attaches to the judgment entered in the case.

It may be suggested here that, under the definition proposed, it would be obviously unjust to include the child variously called the dependent or destitute child, the child whose case presents to the judge the single question of relief. Most of the laws, as they exist now, embrace such children, and there are few courts in which cases

of this kind do not now arise. They are not properly cases for the court, and should not reach the court. They should be cared for by organized relief agencies and should reach the court only when the question of parental neglect enters in.

We may modify and soften the proceeding in court to the greatest possible extent and take away from it all of the sting. It will, nevertheless, be a grave injustice to the court and to the dependent or destitute child to bring it into court. The jurisdiction, as I view it, should be narrowed so as to exclude wholly cases of this kind.

For the purpose of emphasizing still further the nature of the proceeding, one step more should be taken. We need to get away, more completely, from the criminal terminology, still employed. With striking inconsistency, we institute a proceeding in chancery with the idea dominant that we want to protect the child, that we want no stigma to attach to it; and yet we publish elaborate reports dealing with every phase of crime, from idling and loitering to the worst offenses against public morality. I confess that I am unable to see any possible value that can attach to the fine distinctions of the criminal law as illustrated in the published statistics of the juvenile courts. An examination of the reports discloses the fact that the cases are sub-divided according to the rigid definitions of the criminal law. We find grand and petit larceny, burglary, robbery and arson and the entire list of crimes. The classification is adhered to in some courts on the theory that the time required for the cure of the child is to be determined in some measure by the act with which the child stands charged. In practice, however, it is doubtful if this theory is worth much. The act is merely the local evidence of pathological social conditions. The conditions that are responsible for the appearance of a child in court on the charge of loitering may take quite as much time to correct as those embraced in a charge of robbery. As a matter of fact, some of the most difficult cases presented to the courts are those covered by the inclusive term "incorrigible" or "habitually truant" from school.

The criminal terminology is another survival of the older method. It is adhered to because there is still doubt as to the nature of the proceeding and because the feeling still persists that it is necessary to charge the child with the doing of a particular act. The statisticians will, doubtless, insist that we must cling to the old

classification. If we are to continue to deal with the child as a criminal and in terms of crime, I grant we would have to continue to use some such terminology; but with the attitude of society to the offending child completely changed, some classification in harmony with the spirit of the law should, and can, be worked out.

It is clear that what I have said concerns the court, in the main, from the legal viewpoint. Important as this side is, the measure of the court's work in a community will depend on the efficiency with which it is administered on the social side. The probation office, the detention home, the clinic, each carefully and systematically organized, with efficient officials, go to make up the machinery by which the real problems confronting the court will be worked out.

A court which endeavors to do its work without such a force, or without realizing its importance, is but a poor makeshift and is doomed to failure. On the other hand, a court that realizes the importance of these functions, and that, through them, touches all the larger social activities in the community, is fulfilling its real purpose, and such a court must become a powerful agent in uncovering hideous social wrongs.